STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
JUDGES MARKEY, FITZGERALD and OWENS

CARSON FISCHER, PLC,

Plaintiff-Appellee,

v.

MICHIGAN NATIONAL BANK and
MICHIGAN NATIONAL CORPORATION,

Defendants-Appellants.

Supreme Court No. 128689

Court of Appeals No. 248167

Oakland County Circuit Court
No. 01-029814-CZ
Hon. Rudy J. Nichols

SUPPLEMENTAL BRIEF OF APPELLEE CARSON FISCHER, PLC REGARDING ISSUES RAISED AT ORAL ARGUMENT

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I. The Account Agreement Is Irrelevant As A Matter Of Law And Does Not, By Its Express Terms, Apply To The Facts Of This Case

At oral argument, the Court became focused on Michigan National Bank's account agreement with Carson Fischer (the "Agreement"; *see* Appendix pp. 190a-196a) based on the contention by counsel for Michigan National Bank ("MNB") that the transactions involving Rasor triggered the notification requirements under the Agreement.

They did not. MNB relies on the provision the Agreement which requires notice where there has been an improper charge. There were no improper charges because, as Carson Fischer explained in its brief and at oral argument, the checks were "properly payable" within the meaning of MCL 440.4401 — they just were not properly payable to Rasor.

Because the checks were "properly payable," the checks were also properly charged to the Carson Fischer account on which the checks were drawn. Thus, as Carson Fischer explained at oral argument, an examination of the checks and MNB's statements would not disclose that MNB had improperly paid Rasor. That is why the Court of Appeals correctly concluded that neither UCC Section 4-406, MCL 440.4406, nor the account agreement applies to scams like Rasor's scam. *Carson Fischer PLC v. Standard Federal Bank*, 2005 WL 292343 at *4, 56 UCC Rep.Serv.2d 94 (Mich.App. 2005).

Both the Agreement and Section 4-406 impose obligations on a customer based on the customer's examination of the cancelled checks and the bank statement for matters which could be determined based on the cancelled checks and the bank statement. *See* MCL 440.4406(3) ("If ***based on the statement or items provided***, the customer should ***reasonably*** have discovered the unauthorized payment, the customer must notify the bank of the relevant facts") (emphasis added); and Agreement, ¶ 2 in section captioned "Commercial Checking Accounts ("You agree to promptly ***examine your statement and***, if applicable to your account, ***all cancelled checks***

contained with your statement, and to notify the Bank of any discrepancies, forgeries or improper charges to your account within thirty (30) days after the Bank mails or otherwise makes your statement available to you."). Appendix, p. 192a.

When the bank statements were returned, Carson Fischer observed that charges were made to their accounts in the same amounts that the checks were written to MNB. Thus, the bank statements and checks do not disclose an "improper charge" or "discrepancy." The bank statements and checks purport to show what Carson Fischer believed happened, did, in fact, happen. That is, checks "properly payable" to, and which were not "improper charges" when paid to, Michigan National cleared their accounts. The checks and statements show the "proper" party was paid the "proper" amount.

The checks and bank statements do not disclose that Michigan National funneled the money to Rasor by treating the checks as made payable to bearer. Had the checks contained Rasor's endorsement, a different case would exist. In that circumstance, the endorsement of Rasor might provide notice from the returned checks that something was amiss. Here, however, Michigan National never had Rasor endorse the checks, so when the checks came back to Carson Fischer, it appeared the funds went to the designated payee, Michigan National Bank.

The Court seemed to consider why would Carson Fischer not realize that the checks paid to Michigan National were not funding any real obligation. Carson Fischer did pay Michigan National directly, at various times, to repay loans and to pay certain of Carson Fischer's tax obligations. Further, this analysis of what the MNB Checks went to pay would require the review of other documents not demanded by the UCC or Account Agreement. There is no evidence in the record that the other documents would necessarily be available within the same 30 days period required for review of the Account Agreement.

For example, ABC Company pays a loan obligation to Bank with the check charge appearing immediately on its next checking statement, and the Bank does not properly credit the loan account, giving the money to a stranger who does not endorse the check. The Bank statement does not disclose an improper charge occurred. Not until more than 30 days later does the Bank mail the loan statement that would disclose a payment was not received. Under MNB's argument, the customer, ABC Company, is barred from asserting an "improper charge" because it did not do so within 30 days of receiving its bank statement. Thus, if customers must rely upon other documents than the bank statements and cancelled checks to determine if an "improper charge" exists, there is no guarantee that the customer will have the necessary information from a third-party payee that the money was properly applied within that 30 day review period. Basically, applying MNB's argument here creates an absolute exculpation for misconduct prohibited by the UCC and not contemplated by the Account Agreement.

Because the statements and cancelled checks do not disclose an "improper charge," the Court should reject MNB's argument that the Court can decide this issue on the Agreement alone.

II. Even If Relevant, It Is Clear From The Account Agreement That There Is No Intent To Expand UCC Section 4-406

It is clear that the language in Michigan National's Agreement does not expand the scope of Section 4-406. The Agreement requires notification of "discrepancies, forgeries or improper charges. . . ." That language is not materially different than the language in Section 4-406, which addresses "unauthorized signatures" and "alterations." If anything, it is a subclass of the categories in Section 4-406.

It should also be noted, in this context, that the Agreement itself does not use language consistently. Sometimes it speaks of "discrepancies," sometimes its speaks of "alterations."

Sometimes it speaks of "discrepancies" and "improper charges," sometimes it does not include "improper charges." At most, therefore, MNB's invocation of the Agreement raises a factual issue about what was included and how those inclusions compare to Section 4-406. This issue was not considered by the trial court; and it should not be considered for the first time by this Court.

MNB's argument assumes "improper charges" somehow add significantly to the customer's obligation; but those words do not. There are simply the "flip side" of Section 4-401 which requires that items be "properly payable." If an item is not properly payable, it is an improper charge. If an item is properly payable, it is not an improper charge.

III. If The Account Agreement Does Purport To Extend UCC Section 4-406, It May Not Do So

A. UCC Section 4-103 Prohibits Expansion Of Section 4-406 In The Manner Advocated By Michigan National

The relevant portion of Section 4-103 states:

> (1) The effect of the provisions of this article may be varied by agreement but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

Michigan National's attempts to modify Section 4-406 violate this provision in at least the following ways.

First, if as MNB now seems to argue, the term "improper charge" has some substantive meaning that differs from a charge which is not "properly payable" within the meaning of Section 4-401, then MNB is not merely change the notice period but it also changing substantive rights in a way that does violence to the core requirements of Article 4.

Second, if MNB is claiming that MNB is not liable under the rule established by *Allis Chalmers Leasing Services Corp. v. Byron Center State Bank*, 129 Mich.App. 602, 341 N.W.2d 837 (1983), then it is attempting to disclaim it core obligations as a bank, namely to treat a customer's funds as the customer's, not the bank's.

Third, MNB would be requiring a customer to examine not merely its checks and statements but also other financial information, all within 30 days, which is completely contrary to the statutory scheme which only requires the customer to examine the bank statements and cancelled checks.

Fourth, UCC Section 1-102, MCL 440.1102, prohibits a party from altering by contract express terms of the Code, which is what Michigan National attempts here. Section 1-102 states in relevant part:

> (3) The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

Here, Michigan National is attempting to modify the "care prescribed by this act" by altering the care it must exercise.

This position is confirmed by comment 2 to Section 1-102: "The meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement." Here, Michigan National is attempting to vary the definitions of Section 4-406 by agreement. This is not permitted and must be rejected.[1]

The Agreement simply cannot work as advocated by Michigan National.

B. Expansion Of UCC Section 4-406 Causes LESS Not More Certainty In the Financial Community

At the end of oral argument, the Court asked counsel for Michigan National if the language in the Agreement was standard. First, counsel for Michigan National is not qualified to express an opinion on all account agreements used in the United States, or even Michigan. Second, if he were, that would be a fact question not properly resolved by this Court.

More importantly, the one known truth is that the UCC is consistent throughout the State of Michigan. If the Court opens pandora's box allowing financial institutions to vary the definitional terms of the UCC by contract, the UCC will become a dead letter as disputes will devolve to a resolution of contracts.

While there certainly will be some consistency in agreements, it is probable more sophisticated and desirable customers will be able to negotiate different agreements. Thus, some customers within banks will have rights different from others. It is also certain that different banks will offer different terms. Thus, rather than a consistency of the known scope of Section 4-406, courts of this State will be resolving contract disputes with varying results dictated by contract issues like: (1) intent of the parties; (2) ambiguous drafting and (3) overreaching.

Instead of the well interpreted definitions supplied by and incorporated in the law of the UCC, litigants will now argue what are the actual meaning of the terms in the contract.[2] If the meaning is one consistent with the UCC, then the Court should agree with Carson Fischer's

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[1] As discussed elsewhere in this brief, allowing parties to vary the definitional application of this Section of the UCC will create commercial chaos, not order.

[2] Of course, without the definitional guidance of the UCC and the factors of interpreting and enforcing individual contracts, such as intent. Similar terms in similar contracts may well be subject to different interpretations based on the underlying facts of each transaction. This will create additional confusion as to the reach of Section 4-406 in any given account agreement.

argument above that the language of the Agreement here is no more or less than what is required by Section 4-406.

If not, the Court is inviting more, not less litigation on these issues as each individual account agreement, with its varying language and nuance will be subject to review.

CONCLUSION

This Court should affirm the Court of Appeals.

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